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PROBATING A DUPLICATE WILL—Before *Furber's Estate*¹ the courts, both in this country and in England, had uniformly held that an admittedly duplicate will was not entitled to probate, generally on the ground that, being a duplicate, it could add nothing to the original will already probated.

But the court in *Furber's Estate* held that "the proponents have a right to offer the duplicate paper for probate," thus establishing a new precedent.

That case is the leading case at this date, as it was not appealed and has not been overruled.

As *Furber's* estate has been settled and distributed, a discussion of the case is now proper.

The case arose in an appeal from a decree of the Register of Wills of Philadelphia County, admitting a will to probate, because he had not, at the same time, admitted the duplicate will to probate as a part of the original will.

The point of the case for the appellant, a charity, residuary legatee, was that the decision enabled it to offer the duplicate will for probate, and, in that proceeding, to prove the signatures of the two subscribing witnesses, which had not been proved at the probate of the original will (in fact, one of them had been denied), and, by proving these, to validate the bequest to itself.

A statement of the causes which led up to the case; the new forms of procedure, invented to fit the case, in detail, and the result of the case, may be of interest to the profession, not only in Pennsylvania, but, by analogy, in other states, as matter of law and practice in a like case; and a like case may arise, because duplicate wills, while unusual, are not rare.

As to the Register of Wills, it was held in *Topham's Estate*,² that

The Register, *qua* Register of Wills, is a separate, independent County official, whose duties are prescribed by statute. His court is not a court of record, and, in the discharge of the duties thereof, he is entirely independent of the direction of the Orphans' Court, whose jurisdiction is that of an appellate court. Should an appeal be taken from his decision, such appeal is a proceeding *de novo*.

That explains the language in the decree in *Furber's Estate* (*infra*), *viz.*:

And the said decree of said Register of Wills is opened to enable him to consider a petition for probate of the other paper writing.

The Register is not commanded to probate the duplicate will; he is commanded to consider whether or not he will, in his judgment, admit it to probate.

¹ 22 Pa. Dist. Rep. 987 (1013).

² 12 Pa. Dist. Rep. 4 (1902). See also Act 15 March 1832, Secs. 5 and 31, P. L. 136 and 144; and also 4 Stew. Purd. Dig. 4077, note n, and 4082, note o.

The proponent is given the right to offer the duplicate will for probate. The Register must receive it for consideration and proof

If it is properly proved, like any other will, he must admit it to probate.

THE FURBER CASE.

Caroline E. Furber, spinster, died in 1911, in Philadelphia, leaving two wills, exact duplicates, in which she left her residuary estate to a charity. Both wills were witnessed by the same two witnesses, Solomon and Warfield. Solomon died before testatrix.

On June 8, 1911, one of these two wills was offered by the Executor for probate in Philadelphia. Caveats were filed by the next of kin. At the hearing before the Register of Wills the other will was offered in evidence as Exhibit A. Mrs. Warfield testified that she had not signed either; that the signatures purporting to be hers were not hers. (*Her testimony, if true, of course, invalidated the bequest to the charity.*)³ The will offered for probate was admitted to probate December 11, 1911.

In 1912 Mrs. Warfield died.

In January, 1913, the Executor filed its account, which was set for audit by the Orphans' Court of Philadelphia in February, and notified the charity (a Boston religious corporation), which then, learning for the first time of the existence of the will, as it had had no notice of its probate, retained me; and the audit was continued at my request.

As the next of kin proposed to contest the bequest the charity *on the ground that the will was not witnessed by two witnesses in accordance with the statute*,⁴ I requested the Executor to appeal from the decree of the Register, which it declined to do, but stated that it would not oppose such an appeal.

I accordingly, on May 3, 1913, filed in the office of the Register of Wills the following

APPEAL:

To the Register of Wills of Philadelphia County:

Estate of Caroline E. Furber, deceased:

The undersigned hereby appeals to the Orphans' Court of said County from the decision of the Register of Wills in the above Estate admitting to probate a certain paper writing, dated the fifth day of August, 1886, *alone* as the last will and testament of said decedent and failing⁵ to admit therewith a certain other paper writing, dated August 5, 1886, as part of the last will and testament of said decedent.

Board of Missions, Residuary Legatee under the
Will of CAROLINE E. FURBER, deceased.

³ Two witnesses necessary; Act 26 April 1855, Sec. 11, P. L. 332.

⁴ Act 26 April, 1855, Sec. 11, P. L. 332.

⁵ Such an appeal had never before been taken, so far as the Register of Wills and I knew.

Security was entered on the appeal, and the petition put on the Orphans' Court Motion List.

On May 17, 1913, I presented to the Orphans' Court, and filed, the following

PETITION:

To the Honorable, the Judges of Said Court:

The petition of the Board of Missions, residuary legatee under the will of Caroline E. Furber, deceased, respectfully represents:

That Caroline E. Furber, late of said County, died in the City of Philadelphia on the 25th day of March, 1911, leaving two holographic documents purporting to be her will, both dated August 5, 1886, and both bearing the signatures of William A. Solomon and Aimee S. Warfield as witnesses, and each the duplicate of the other, except that upon one the signature of Aimee S. Warfield is imperfect and on the other is perfect; copies of which documents are hereto attached, marked Exhibit A and Exhibit B.

That the Register of Wills of said County admitted to probate, December 11, 1911, upon the testimony of persons other than said two witnesses, said will containing said imperfect signature (Exhibit A), which was numbered 2693 of 1911, and recorded in Will Book, No. 332, page 318, etc., and admitted as merely an exhibit said will containing said perfect signature, but did not admit to probate said will containing said perfect signature, said document not having been offered for probate by proponent.

That both of said wills should have been offered for probate by said proponent, and both should have been admitted to probate by said Register of Wills.

That in both said wills your Petitioner is named as residuary legatee, and The Philadelphia Trust, Safe Deposit and Insurance Company is named as Executor, and that said Company duly qualified as Executor.

That said Caroline E. Furber left also another holographic document, explanatory of said two wills, of which the following is a copy:

"MEMORANDA

One of my three wills (each being the duplicate of the other two) has the signatures of the witnesses in the following order:

Aimee S. Warfield

Wm. A. Solomon

This one with the original certificate of Dr. Morris I shall probably retain.

The other two which are severally in the keeping of Mr. Hipple and Mr. Solomon have the signatures of the witnesses in the following order:

Wm. A. Solomon

Aimee S. Warfield

Handed to Mr. Hipple by Caroline E. Furber.

Date of writing above Dec. 7, 1886.

C. E. FURBER."

That, judging from the order of the signatures of the witnesses, the will probated is either the will left with Solomon or the will left with Hipple, and the will not probated is the one which she says "I shall probably retain."

That the third will has not yet been found.

That your Petitioner is informed and believes and therefore avers, that said imperfect signature of Aimee S. Warfield upon the will probated will be called in question by the next of kin of the decedent upon the audit of the Account of said Executor, thereby putting the bequest to your Petitioner in jeopardy.

That the other legatees named in both said wills are S— and W—.

That your Petitioner is informed and believes and therefore avers, that said S— and W— are next of kin to said decedent.

That your Petitioner has appealed to your honorable court from the decision of said Register of Wills in said Estate, admitting to probate a certain paper writing, dated the fifth day of August 1886, *alone* as the last will and testament of said decedent, and failing to admit therewith a certain other paper writing dated August 5, 1886, as part of the last will and testament of said decedent.

WHEREFORE your Petitioner prays that a citation may issue, directed to the said The Philadelphia Trust, Safe Deposit and Insurance Company, Executors, and said S— and W—, who are, your Petitioner is informed and believes and therefore avers, the only parties interested except your Petitioner, commanding them to appear before your honorable court on a day certain to show cause why said appeal from the decision of said Register of Wills admitting to probate a certain paper writing, dated the fifth day of August, 1886, *alone* as the last will and testament of said decedent, and failing to admit therewith a certain other paper writing dated August 5, 1886, as part of the last will and testament of said decedent, should not be sustained, and said decision of said Register of Wills be opened to enable him to consider a Petition for the probate of said other paper writing dated August 5, 1886, as part of the last will and testament of said decedent.

And your Petitioner will ever pray, etc.

BOARD OF MISSIONS,

DECREE AWARDED CITATION.

AND NOW, May 17th, 1913, on consideration of the foregoing Petition, and on motion of Charles P. Sherman, pro Petitioner, the court order that a citation issue directed to the Philadelphia Trust, Safe Deposit and Insurance Company, Executor of the will of Caroline E. Furber, deceased, and S— and W—, commanding them to appear before the court to answer the Petition of the Board of Missions and show cause why an appeal from the decision of the Register of Wills of Philadelphia County, made December 11, 1911, admitting to probate a certain paper writing, dated the fifth day of August, 1886, *alone* as the last will and testament of Caroline E. Furber, deceased, and failing to admit therewith a certain other paper writing dated August 5, 1886, as part of the last will and testament of said decedent, should not be sustained, and said decision of said Register of Wills be opened to enable him to consider a Petition for the probate of said other paper writing, dated August 5, 1886, as part of the last will and testament of said decedent.

Returnable seq. reg.

GEST, J.

Citations were issued and served, and the answers of the Executor and of the next of kin filed, and the appeal put on the list for argument.

The audit was continued pending the appeal.

Testimony was taken before the court on the appeal, and the case argued, before Gest, J., October 16, 1913.

Gest, J., after reciting the facts, said in part:

OPINION:

This appeal is taken in order that the decree of the Register of Wills may be opened so as to enable him to consider a petition for the probate of the other paper writing, dated August 5, 1886, as a part of the last will and testament of Caroline E. Furber, deceased.

It was contended that the signature of Aimee S. Warfield to the paper

admitted to probate was imperfect, but that the signature of Aimee S. Warfield to the second paper was without imperfection. This fact, however, or its relevancy, if it be a fact, is not necessary for the present presiding judge to decide.

The testimony of John R. Naulty and William D. Geiger was taken by the presiding judge as to the signatures of the testatrix, and these witnesses have also testified before the Register of Wills. It further appeared that the Board of Missions, residuary legatee in both testamentary papers, and the appellant now before the court, was not represented or present before the Register of Wills.

The signature of the testatrix to the second testamentary paper, which had been marked at a hearing before the Register as "A Oct. 17/11 Register," was not disputed. *The only question was whether the paper, being a duplicate of the will already admitted to probate and being marked "Duplicate" in the handwriting of the testatrix, was entitled to admission to probate as a part of her will.*

The motive of the testatrix in executing her will in duplicate, or indeed in triplicate, if reliance may be placed upon the holographic writing, marked "Memoranda," offered in evidence, is not important. *The only question is whether one of them should be admitted to probate alone as constituting the will of the testatrix, or whether the Register should admit both as together constituting her last will upon due proof being made in accordance with law.*

This appeal was indeed opposed on the ground that as the provisions of the two wills were the same no good purpose would be accomplished by proving both. *But the proponents have a right to offer the duplicate paper for probate, and all other questions will be for subsequent consideration either by the Register or by this court. Further discussion seems unnecessary.*

It is proper to add that at the hearing before the Register no petition for the probate of the duplicate paper was presented.

DECREE:

AND NOW, this 24th day of October, 1913, the appeal of the Board of Missions from the decree of the Register of Wills admitting to probate a certain paper writing, dated the 5th day of August, 1886, as the last will and testament of Caroline E. Furber, deceased, and the said decree of said Register of Wills is opened to enable him to consider a petition for probate of the other paper writing, dated August 5, 1886, as a part of the last will and testament of the said decedent.

No exceptions to the decree were filed.

By this appeal I established a *case de novo* * before the Register, and thus obtained the opportunity to prove, in the regular way, the signatures of the two witnesses to the duplicate will, and incidentally to the will already probated.

On December 16, 1913, I filed the following:

PETITION FOR PROBATE:

To the Register of Wills of Philadelphia County:

The Petition of the Board of Missions respectfully sheweth: That it is the residuary legatee named in the last will and testament of Caroline E. Furber, dated the fifth day of August, A. D., 1886: . . . that said last will and testament was admitted to probate in Philadelphia County, Decem-

See note 2, *supra*.

ber 11, 1911, and that said decree of Probate was opened by decree of the Orphans Court of Philadelphia County, dated October 24, 1913, to enable said Register of Wills to consider a Petition for Probate of a certain other paper writing, dated August 5, 1886, as a part of the last will and testament of the said decedent. Therefore said Board of Missions respectfully applies for probate of said other paper writing, dated August 5, 1886, as part of the said last will and testament.

BOARD OF MISSIONS.

Hearings before the Register were had from December, 1913, to April, 1915, during which *Mrs. Warfield's* and Solomon's *signatures to both wills were so conclusively proved* that the next of kin, who had contested the probate of the duplicate will, abandoned the contest.

The duplicate will was, on March 21, 1916, admitted by the Register to probate "as part of the last will and testament of Caroline E. Furber, deceased," and the Executor qualified thereunder.

The charity won.

Charles P. Sherman.

Of the Philadelphia Bar.